FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 1 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 331

THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,

Appellant,

vs.

MARK GRAVES, OGDEN J. ROSS AND JOHN P. HENNESSEY, AS AND CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN J. BENNETT, JR.,
Attorney General of New York,
WENDELL P. BROWN,
JOHN C. CRARY, JR.,
Assistant Attorneys-General of New York,
Counsel for Appellees.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Statement	1
Argument	3
Exhibit "A"—Order of the Appellate Division of the Supreme Court of New York	6
Exhibit "B"—Opinion of the Appellate Division of the Supreme Court of New York in *Modern Industrial Bank* v. *Graves*	7

Table of Cases Cited.

Bacon & Sons v. *Martin*, 305 U. S. 380	4
Barclay & Co. v. *Edwards*, 267 U. S. 442	4
Bell's Gap R. R. v. *Penna.*, 134 U. S. 232	4
Home Ins. Co. v. *New York*, 134 U. S. 594	4
Modern Industrial Bank v. *Graves*, 260 App. Div. 349, 285 N. Y. Mem. 156	2, 4
Morris Plan Industrial Bank v. *Graves*, 260 App. Div. 978	2

Statutes Cited.

Banking Law of New York:	
Article 3	4
Article 7	3
New York Constitution, Art. VI, Sec. 7:	
C. P. A. Sec. 588, subdvs. 1 and 3	2
Subdv. 5; C. P. A. Sec. 588, subdv. 5	3
Tax Law of New York:	
Article 9-A	4
Article 9-B (Chap. 286 of the Laws of 1926), Section 219-p, subdivision 6	3, 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 331

THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK,

Appellant,

vs.

MARK GRAVES, OGDEN J. ROSS AND JOHN P. HENNESSEY, AS AND CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the order and judgment appealed from be affirmed.

Statement.

This appeal is from an order of the Appellate Division of the New York Supreme Court for the Third Judicial Department made in the proceeding in the nature of certio-

rari to review a determination of the appellees comprising the State Tax Commission affirming an assessment of franchise taxes under Article 9-A of the Tax Law rather than Article 9-B. The Appellate Division confirmed such determination in a unanimous memorandum decision (260 App. Div. 978) on the ground that the identical question had been passed on by that court adversely to petitioner (appellant here) in *Modern Industrial Bank* v. *Graves*, 260 App. Div. 349. Copies of both such decisions are annexed hereto. The latter was subsequently unanimously affirmed by the Court of Appeals without opinion (285 N. Y. Mem. 156).

Appellant has filed a notice of appeal to the Court of Appeals as of right, asserting a tax classification in violation of both State and Federal Constitutions (Ex. A, Appellant's Jurisdictional Statement). Possibly as a matter of caution appellant also made successive applications for leave to appeal to the Appellate Division and Court of Appeals, both of which were denied without comment. Appellant then moved for reargument of the motion in Court of Appeals, asking for amendment of the order to show whether review was denied because appeal could be prosecuted of right so it could be determined for purposes of appeal to this court whether its remedies in the State courts were exhausted. The Court of Appeals denied this motion saying: "Denial of original motion was not based on the ground that appeal lies of right."

The highest State court and the court of last resort as a matter of right where a question under either State or Federal Constitution is directly involved is the Court of Appeals (N. Y. Constitution, Art. VI, § 7; C. P. A. § 588, Subdvs. 1 and 3). Appeal to the Court of Appeals may be permitted in cases not appealable under subdivision 1 by the Appellate Division or upon refusal by the Court of Appeals where it is felt a question of law is involved which

ought to be reviewed by the Court of Appeals. (N. Y. Const. Art. VI, § 7, subdv. 5; C. P. A. § 588, subdv. 5.)

The appeal taken by service of notice thereof has never been brought on for disposition. It remains pending and undisposed of in the Court of Appeals. Dismissal has never been asked nor granted, nor has the Court of Appeals determined that no constitutional question is presented. Its original refusal of review was made on the same day as its decision in *Modern Industrial Bank* v. *Graves, supra,* involving the identical issue. It has not determined that appeal herein does not lie of right. It has said only that permission to appeal was not denied on that ground. This is no more than a decision that there were no issues involved meriting permissive review.

The issue of invalid classification is the same under both State and Federal Constitutions. If a real constitutional question is directly presented as appellant asserts, there is a constitutional and statutory right to review by the Court of Appeals. That right has been neither pressed in nor denied by that court, although the procedure for taking it has been set in motion. There is accordingly no determination by the highest State court to confer jurisdiction under Section 237 of the Judicial Code.

Argument.

The case presents no substantial Federal question. Appellant is a corporation organized in 1924 and operating under the statutes of New York authorizing the business of Morris plan or industrial loans (Banking Law, Art. 7).

By Chapter 286 of the Laws of 1926, Article 9-B was added to the Tax Law imposing a tax on banks and companies doing a banking business. The statute contains in subdivision 6 of section 219-p the following clause: "Notwithstanding the provisions of this article, all corporations

of classes now or heretofore taxable under article nine-a of this chapter shall continue to be taxable under article nine-a." The Tax Law has not since been changed in this respect. Appellant concedes that it was properly classified and taxed under Article 9-A of the Tax Law at the time of the enactment of Article 9-B (Appellant's Jurisdictional Statement, § 4). Its claim is that subsequent amendments of the Banking Law have eliminated all substantial differences between industrial banks and State banks organized under Article 3 of the Banking Law so that classification under Article 9-A of the Tax Law has now become discriminatory. It is equivalent to a claim that industrial banks have evolved into full-fledged banks.

This presents an issue of the construction of powers conferred by State law already conclusively determined in the State courts in *Modern Industrial Bank* v. *Graves*, 260 App. Div. 349, aff'd 285 N. Y. Mem. 156. The opinion of the Appellate Division in that case points out that industrial banks have not become possessed of all of the powers of commercial banks, but do possess an industrial loan power more extensive than the personal loan power of the latter. Appellees have not, from the beginning, taken issue with the constitutional principles of tax classification. Their entire argument has been addressed to the differences justifying classification under the State statutes. The decision of the State courts as to the difference in the powers conferred by State law is binding here and presents no Federal question. *Bacon & Sons* v. *Martin*, 305 U. S. 380.

The broad power of the State to determine its tax policy and to apply it in the selection of the subjects of taxation for the apportionment of a public burden is clear. Distinction between franchises is no objection if all in the same class are treated alike. *Home Ins. Co.* v. *N. Y.*, 134 U. S. 594; *Bell's Gap R. R.* v. *Penna.*, 134 U. S. 232; *Beers* v. *Glynn*, 211 U. S. 477; *Barclay & Co.* v. *Edwards*, 267 U. S.

442. Here the claim of invalid discrimination rests upon issues of the nature and extent of franchises granted by the State which have been decided adversely to appellant's contention by the courts of the State. The determination of those issues presents no Federal question and the holding of the State courts thereon brings the case within principles of State power long since laid down by this Court and hardly in dispute.

Dated, July 26, 1941.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Attorney for Appellees;
WENDELL P. BROWN,
JOHN C. CRARY, JR.,
Assistant Attorneys-General
of the State of New York,
Counsel for Appellees,
The Capitol, Albany, N. Y.

EXHIBIT "A".

Copy.

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT.

Decision handed down Nov. 20, 1940.

390-34.

In the Matter of the Application of THE MORRIS PLAN INDUSTRIAL BANK OF NEW YORK, Petitioner, for an order of certiorari, v. MARK GRAVES, and Others, as and Constituting the State Tax Commission of the State of New York, Respondents.

Review of a determination of the State Tax Commission under Article 78 of the Civil Practice Act. The tax has been imposed upon petitioner under Article 9-A of the Tax Law. The argument of petitioner is that the lesser tax prescribed by Article 9-B should have been imposed. The identical question here presented has been passed upon by this court adversely to petitioner in Modern Industrial Bank *v.* Graves, 260 A. D. 349.

Determination unanimously confirmed, with fifty dollars costs and disbursements.

Present: Hill, P. J., Crapser, Bliss, Heffernan and Schenck, JJ.

EXHIBIT "B".

Copy.

SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT.

Decision Handed Down July 2, 1940.

In the Matter of the Application of THE MODERN INDUSTRIAL BANK, *Petitioner,* for an Order of Certiorari,

v.

MARK GRAVES and Others, as and Constituting the State Tax Commission of the State of New York, *Respondents,* to Review a Determination Made under Article 9-A of the Tax Law.

Proceeding under article 78 of the Civil Practice Act, pursuant to an order granted out of the Supreme Court at the Albany Special Term (Russell, J.) on the 9th day of February, 1940, to review a determination of the State Tax Commission holding petitioner subject to the tax imposed by article 9-A of the Tax Law.

Livingston & Livingston [Sylvia Livingston of counsel], for the petitioner.

John J. Bennett, Jr., Attorney-General [Wendell P. Brown and John C. Crary, Jr., Assistant Attorneys-General, of counsel], for the respondents.

Foster, J. This is a proceeding to review a determination of the State Tax Commission which held petitioner subject to the tax imposed by artice 9-A of the Tax Law. Petitioner claims that because of certain changes in their statutory powers industrial banks have become a new class of corporations doing a banking business within the application of article 9-B of the Tax Law, and taxable only on the same basis as commercial banks under that article.

Petitioner was incorporated in 1924 as an investment company under article 7 of the Banking Law then in force, and has continued to engage in the industrial loan business

ever since. It has paid taxes since its inception, up to and including the tax year of 1936, under article 9-A of the Tax Law (originally enacted by Laws of 1917, chap. 726), which provides for a franchise tax on corporations based on net income. By chapter 286 of the Laws of 1926, article 9-B was added to the Tax Law, and imposed a tax on banks and companies doing a banking business. However, before it became effective this article was amended by chapter 477 of the Laws of 1927, and a saving clause was attached which provides that "Notwithstanding the provisions of this article, all corporations of classes now or heretofore taxable under article nine-a of this chapter shall continue to be taxable under article nine-a."

It is thus apparent that the Legislature did not intend to tax investment companies under this article but to continue the taxation of such companies under article 9-A. There were amendments to the Banking Law in 1931 (Chaps. 490 and 494), but these amendments dealt with the separation of investment companies which engage in the industrial loan business (Morris Plan) and those which do not. This separation did not affect the principle of taxation, and there has been no change in the Tax Law to indicate any intent on the part of the Legislature to alter the application of article 9-A to all classes of corporate business previously taxable thereunder.

The intent of the Legislature to differentiate industrial banks from commercial banks may also be found in section 312 of the Banking Law, which provides in part that an industrial bank "may become a bank with all the powers and subject to all the obligations and duties of banks" by filing a new organization certificate and complying with certain other conditions.

Moreover, there are important differences between the two classifications. Banks in the complete sense of the term possess all the powers of banking business, such as the power to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt; to receive deposits of money and commercial paper; to loan money on real or personal security, and to buy and sell gold and silver bullion, foreign coins or bills of exchange. (*Meserole*

Securities Co. v. *Cosman*, 253 N. Y. 130). Industrial banks possess some but not all of these powers. The power to discount generally is not given to them, nor do they possess the power to buy and sell coin, bullion and exchange. On the other hand, they are authorized to make industrial loans, so called, where the interest rate is considerably in excess of six per cent. Commercial banks do not possess this power in full, or of right, but may only operate a personal loan department upon authorization of the Superintendent of Banks, and loans thereunder are limited to $3,500, while industrial banks may make Morris Plan loans up to $5,000. (Banking Law, §§ 108 and 294). These variances are sufficient to support different classifications, and further to indicate that industrial banks do not possess full banking powers. The Legislature had the power to select and classify them as to taxation, so long as all in the same class are treated alike, without infringing upon any constitutional right guaranteed by either the State or Federal Constitution. (*People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431.)

The determination of the Tax Commission should be confirmed, without costs.

Hill, P. J., Crapser, Bliss and Hefferman, JJ., concur.

Determination of the Tax Commission confirmed, without costs.